

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EUFEMIA YINGLING
Claimant

VS.

**TRAINING & EVALUATION CENTER
OF HUTCHINSON, INC.**
Respondent

AND

**ACCIDENT FUND INS. CO. OF
AMERICA**
Insurance Carrier

Docket No. 1,044,611

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 31, 2009, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment, finding that she failed to establish that she is in need of additional treatment as a result of her work-related injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 6, 2009, Preliminary Hearing and the exhibits and the July 23, 2009, report by Dan M. Gurba, M.D., together with the pleadings contained in the administrative file.

ISSUES

Claimant filed an application for review of the ALJ's preliminary hearing Order, setting out issues of whether claimant has established that she is in need of additional

treatment as a result of her work-related injury and all other appealable issues. Claimant did not file a brief in this appeal.

Respondent argues that the Board does not have jurisdiction to review the preliminary hearing Order in this case because the claimant made no claim that the ALJ exceeded his authority and because the question of whether claimant met with injury arising out of and in the course of her employment with respondent is not an issue before the Board. In the event the Board finds it has jurisdiction in this appeal, respondent argues that the ALJ correctly found that claimant failed to establish her need for additional medical treatment as it relates to her December 9, 2008, injury, and, therefore, the ALJ's Order should be affirmed.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue in this appeal?

(2) If so, did claimant establish her need for additional medical treatment relates to her December 9, 2008, injury?

FINDINGS OF FACT

Claimant was injured at work on December 9, 2008, when she twisted and felt a pop in her right knee. She did not fall. She reported her injury to respondent, and respondent is not disputing that claimant suffered an injury that arose out of and in the course of her employment.

On December 10, 2008, respondent sent claimant to Hutchinson Clinic, where she was seen by Dr. Dana Richman. In giving a history to Dr. Richman, claimant denied any major injuries to her knee in the past but told him she had a history of arthritis and fibromyalgia. Dr. Richman noted that claimant's right knee was somewhat swollen, and she had pain when trying to fully extend the knee. An x-ray of claimant's right knee taken on December 10 showed no evidence of an acute traumatic injury. However, the x-ray report indicated that the presence of a large joint effusion suggested possible internal derangement of the knee. Claimant was given a hinged knee brace and was prescribed pain medication.

Dr. Richman saw claimant again on December 17, 2008, at which time claimant said her knee was doing better. Claimant was able to almost fully extend the knee but could only flex it to 90 degrees.

On December 23, 2008, claimant was involved in an automobile accident where she struck her right knee on the dash of the car. She was wearing a knee brace at the time of the accident. Claimant said that after the automobile accident, her knee was bruised and

discolored. She also had some swelling in her knee, but she said that the swelling had been there since her December 9 accident.

On January 2, 2009, claimant returned to the Hutchinson Clinic, where she was seen by Dr. Jeffrey Thode. Dr. Thode's report indicates there was a small abrasion over claimant's right knee. He stated that her knee was difficult to examine because of the swelling. Dr. Thode's diagnosis was right knee pain with possible internal derangement of the knee. However, in his medical note he indicated that "with the motor vehicle accident, it is difficult to tell whether or not she had damage prior to having the accident, or now is having damage because of the accident. She also has rheumatoid arthritis and may be having a flare with this."¹

An MRI of claimant's right knee done on January 7, 2009, showed she had advanced degenerative arthritis involving all three compartments. She also had medial compartment narrowing, peripheral extrusion of the medial meniscus, and a large amount of increased signal within both the medial and lateral meniscus. The MRI report indicates that "[m]ost if not all of this is probably due just to degeneration."²

On January 15, 2009, claimant was seen by Dr. James Lairmore at the request of Dr. Richman. Claimant told Dr. Lairmore that her pain was not any worse after the motor vehicle accident than before. She also said she had been on crutches since January 2, 2009, because her knee pain was getting worse. Dr. Lairmore aspirated some fluid from her knee. He assessed her with a severely degenerative right knee with a history of rheumatoid arthritis and pain exacerbated by an injury at work. Claimant told Dr. Lairmore that she had no problems in her right knee before her work injury.

Claimant returned to see Dr. Lairmore on January 20, 2009, at which time he recommended she have a right total knee arthroplasty because of severe osteoarthritis of the knee. Dr. Lairmore again noted that claimant was not having any right knee problems before her injury. On February 3, 2009, Dr. Lairmore stated that he believed "this is clearly an exacerbation from a work related injury."³

Although claimant told both Dr. Richman and Dr. Lairmore that she had no previous problems with her right knee, she had sought treatment for right knee problems previously. An x-ray of her right knee in December 2005 showed she had possible joint effusion without evidence of acute fracture or subluxation. She was seen by Dr. Timothy Schweitzer in January 2006 for a sudden onset of right knee pain that may have followed a twisting-type injury. Dr. Schweitzer believed she had possible internal derangement of

¹ P.H. Trans., Cl. Ex. 1 at 17.

² P.H. Trans., Cl. Ex. 1 at 16.

³ P.H. Trans., Cl. Ex. 1 at 4.

the right knee. She was referred to Dr. Erik Severud, who recommended arthroscopic surgery in September 2006, but claimant could not afford the surgery. She saw Dr. Basit Malik in 2006 for treatment of arthritis.

On April 10, 2009, claimant was seen by Dr. John Estivo at the request of respondent. Dr. Estivo opined that claimant's twisting injury of December 9, 2008, would not have been enough of an injury to the right knee to result in the pain, swelling and limited range of motion she had at the examination. He did not believe that claimant required any further treatment regarding the injury of December 9, 2008, stating she may have had a mild strain that day but the primary cause of her pain and swelling was her preexisting rheumatoid arthritis and osteoarthritis of the right knee. He also believed her excessive weight was a major contributing factor to her knee pain. He recommended claimant

pursue further treatment for her right knee under her private insurance. The fact that this patient may one day need a knee replacement is completely unrelated to her injury claim of 12/09/2008. The fact that she may need a knee replacement is directly related to the rheumatoid arthritis to the right knee, which is a natural progression of a preexisting condition.⁴

After hearing testimony at the preliminary hearing, the ALJ ordered an independent medical examination of claimant by Dr. Dan Gurba. The ALJ asked Dr. Gurba to provide him with an opinion on claimant's diagnosis, recommendations for treatment, and causation of her complaints. Dr. Gurba examined claimant on July 23, 2009. He found that claimant had advanced osteoarthritis of the right knee with underlying rheumatoid arthritis, which appeared to have been exacerbated by her work-related injury. However, Dr. Gurba did not believe that claimant required further treatment that would be related directly to the work injury and found her to be at maximum medical improvement in relation to the December 2008 accident. He believed that her current condition was a progression of her preexisting arthritic condition.

This patient has advanced arthritis of the right knee. Her symptoms appear to have been exacerbated by her work related injury in December of 2008. It is also quite clear from review of her medical history that she has had intermittent symptoms related to the right knee dating several years prior to this injury. The patient's diagnosis is advanced osteoarthritis, most likely with underlying rheumatoid arthritis, of the right knee. I believe there is no further treatment indicated that is related directly to the work injury of December 9, 2008. Although the patient's symptoms appear to have increased following the work injury, the fact that she had known advanced osteoarthritis in the knee both radiographically and symptomatically prior to the injury, make me feel this is in fact a progression of a pre-existing condition. I do not believe the subsequent motor vehicle accident is

⁴ P.H. Trans., Resp. Ex. A at 6.

substantially responsible for any of her problems at this time. I do believe the patient is at maximal medical improvement in relation to the December of 2008 work injury. I would not assign any permanent impairment specifically related to that work injury. Given the underlying advanced osteoarthritis the patient's work restrictions at this time would be sedentary work only. The definitive treatment for the patient's problem is total knee replacement. Given her youth and her size I have first recommended weight reduction. Cortisone or viscosupplementation injections could be considered for possible temporary pain relief. These recommendations all relate to the patient's underlying advanced and pre-existing arthritis in the right knee.⁵

PRINCIPLES OF LAW AND ANALYSIS

(1) Does the Board have jurisdiction over the issues in this appeal?

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2008 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

⁵ IME report of Dr. Dan Gurba dated July 23, 2009, (filed Aug. 21, 2009) at 3.

In *Allen*,⁶ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

Here the issue is not whether claimant is in need of additional medical treatment but rather whether the recommended treatment is causally related to her injury at work. Stated another way, the issue is whether claimant's present need for medical treatment is the direct result of the injury that arose out of and in the course of her employment with respondent. K.S.A. 44-534a(a)(2) gives the Board jurisdiction to consider this issue on an appeal from a preliminary hearing order.

(2) Did claimant establish her need for additional medical treatment relates to her December 9, 2008, injury?

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁷ K.S.A. 2008 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁰ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹¹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹²

Dr. Gurba, the court-ordered independent medical examination physician, opined that claimant's December 9, 2008, accident at work aggravated a preexisting degenerative condition in her right knee. However, that aggravation was temporary and has resolved. Her present condition is a natural progression of her preexisting condition. The record contains medical opinions that are both contrary to and consistent with Dr. Gurba's opinion. Based on the record presented to date, this Board Member finds the opinion of Dr. Gurba to be credible and persuasive. He had a more complete history than did Dr. Lairmore, whose causation opinion was based upon an inaccurate belief that claimant had no prior right knee injuries, symptoms or treatment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

⁹ *Id.* at 278.

¹⁰ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹¹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹² *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

¹³ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹⁴ K.S.A. 2008 Supp. 44-555c(k).

CONCLUSION

(1) The Board has jurisdiction over the issue in this appeal.

(2) Claimant has failed to prove that her current need for medical treatment is a direct result of her December 9, 2008, injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 31, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge